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Private Law: Obligations

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2329, under which the matrimonial regime may not be altered conventionally during marriage. The case in any event illustrates the nullity of partitions of community assets before termination of the regime, an all too frequent practice.[15]

OBLIGATIONS

*J. Denson Smith**

Although recovery on the theory of unjust enrichment has a long and venerable history in the civil law, it still suffers from lack of clarity. In *Louisiana State Mineral Board v. Albarado*,[1] the court applied the principle and granted the relator (one of the Boutte heirs in a very small amount) recovery in *quantum meruit* to cover services rendered by him over a period of some thirty years which inured to the benefit of all of the heirs. The court of appeal had found inapplicable the so-called "fund" doctrine applied in the *Interstate* case,[2] which permits recovery from a fund by one whose efforts have been solely responsible for its creation. It also found that relator had at all times acted on the basis of contractual agreements entered into with some of the heirs, and was motivated by the compensation provided for therein. It did not count his action, therefore, as taken for the benefit of all of the heirs so as to support recovery on the theory of unjust enrichment. In the earlier case of *Succession of Kernan*,[3] attorneys who had succeeded in securing a judgment invalidating a particular legacy were denied recovery against other legatees who had refused to employ them. This holding was apparently distinguished by the Supreme Court in the instant case on the ground that the attorneys in *Kernan* rendered

15. When incorporated in judgments of separation or divorce, of course, the provisions of such null conventional partitions become effective as judicial partitions. They cannot be ratified as conventional partitions, for ratification would render them effective as of the date on which they were made, a time at which they were forbidden as a matter of public order. On the other hand, there is no reason why the provisions of such null conventional partitions might not be incorporated into a new act entered into after separation or divorce and effective as of its proper date.

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1. 248 La. 551, 180 So. 2d 700 (1965).

2. *In re* Interstate Trust & Banking Co., 235 La. 825, 106 So. 2d 276 (1958). On this point the opinion of the Supreme Court was in accord.

3. 105 La. 592, 30 So. 239 (1901).

their services exclusively for the persons who had employed them. Such a distinction, although of significance with respect to the quasi-contract of *negotiorum gestio*, which requires that the gestor act for the benefit of the dominus, does not seem appropriate to the problem of recovery on the basis of unjust enrichment stemming from the Roman action *de in rem verso*.[4] In its strict form, *negotiorum gestio* permits recovery of useful expenses when the gestor acts for the benefit of the dominus and not over his permissible objection, whether or not a benefit results. Under a broad theory of unjust enrichment the stated limitations are not applicable and recovery may be based on a patrimonial enrichment without cause, accompanied by another's loss. Instead of being concerned with whether or not services of the kind in question are rendered exclusively for the persons who have engaged them, it might be more justifiable to ask (1) whether there is a legal cause for an enrichment that results from the rendition of services by the claimant under contract with another, and (2) whether the enrichment is to be counted as a direct rather than an indirect and incidental result of the services rendered. The *Kernan* case found that the benefit to the other heirs was indirect and consequential. The instant case suggests that the enrichment was not supported by a legally justifiable cause and, also, that it was direct. It thus seems to extend the theory of unjust enrichment beyond the former jurisprudence. The ultimate policy issue raised by cases like *Albarado* and *Kernan* is whether the view that no one shall be made the debtor of another against his consent should override the moral maxim of the law that no one should enrich himself at the expense of another.[5] The opinion recognized that the payments due for the services were actually owed by the heirs. Recovery against the succession was permitted to avoid delay.

In *Wagenvoord Broadcasting Co. v. Canal Automatic Transmission Serv.*,[6] an order for radio advertising, solicited by an agent of the broadcasting company, was subject to acceptance in writing by the offeree broadcasting company. A revocation of the order a few hours after it was given was held effective notwithstanding that in the meantime it had been accepted in

4. See Nicholas, *Unjustified Enrichment in the Civil Law and Louisiana Law*, 36 TUL. L. REV. 605 (1962), 37 TUL. L. REV. 49 (1962); Payne v. Scott, 14 La. Ann. 760 (1859); Garland v. Scott, 15 La. Ann. 143 (1860).

5. *Cf.* Young v. Coen, 53 So. 2d 508 (La. App. 2d Cir. 1951).

6. 176 So. 2d 188 (La. App. 4th Cir. 1965).

writing as required. The conclusion was that acceptance of an offer requires communication and that there had been no communication of the acceptance prior to the revocation. It was further held that a reasonable time for acceptance had been allowed. Although communication of an acceptance may be counted as contemplated generally by the Civil Code as essential to the formation of a contract, the jurisprudence and French authority are indecisive. In addition, the Code does not preclude a contrary agreement on the part of the offeror. This latter possibility seems not to have been pressed upon the court. Granting, however, that the offeror had not dispensed with notification, it is by no means clear that a period as brief as a few hours should be counted as the "reasonable time . . . from the circumstances of the case he [the proposer] may be supposed to have intended to give to the party to communicate his determination."[7] When parties are dealing face to face, immediate acceptance may be contemplated, and, consequently, required, but when they are at a distance from each other consideration may well be given to ordinary business practices in determining what constitutes a reasonable time for communication. It seems doubtful that business people will normally act with the dispatch required by the instant opinion. Notwithstanding these observations, solicited orders on forms provided by the solicitor that become contracts when later signed by some official may not reflect a real or true intention on the part of the person solicited and can constitute traps for the unwary. If such a practice is necessary for the protection of the principal, prompt action by him may be required also for the protection of the person solicited.

In *Kirkland v. Fauhaber*,[8] the court was very liberal in treating an exchange of two letters as constituting an offer and acceptance covering the sale of 160 acres of land by defendant to plaintiff. There is sound authority against interpreting parties into a contractual status,[9] but there is no indication in the opinion that this view was presented to the court.

The ultimate justification for permitting a third person to bring suit on a contract between others is that it protects his reasonable expectations as well as those of the promisee and also because it affords a direct way of enforcing a performance

7. See LA. CIVIL CODE art. 1809.
8. 175 So. 2d 917 (La. App. 2d Cir. 1965).
9. See 1 WILLISTON, CONTRACTS § 72 (1936); United States v. Braunstein, 75 F. Supp. 137 (D.C.N.Y. 1947).

in accordance with the agreement of the parties. If performance by *A* of a promise he makes to *B* would be of benefit to *C* by way of discharging an obligation owed to him by *B*, and if *A* has reason to know that the benefit is contemplated by *B* as one of the latter's motivating causes in contracting, *C* should be treated as the beneficiary of a stipulation *pour autrui*. There is no requirement that the benefit to the third party be the sole motivating cause of the stipulation. Such a view would preclude the recognition of a right in any third party other than a sole or donee beneficiary. The Louisiana Civil Code does not so restrict the principle;[10] nor does the jurisprudence. The right of a mortgagee against one who has assumed payment of the indebtedness, a common example of such a case, is beyond question.

The foregoing observations are prompted by the case of *Soileau v. Yates Drilling Co.*,[11] in which differing views were expressed concerning the existence of a stipulation *pour autrui*. If the drilling contractor promised to "protect, indemnify, and save harmless" the lessee against all claims of the landowner resulting from the contractor's negligent acts or omissions, a performance in favor of the landowner would seem necessarily to have been contemplated. Also, if the landowner is not recognized as a third party beneficiary and the obligations owed by the lessee to him are not satisfied by the drilling contractor, then the landowner's recourse would have to be against the lessee and the latter in turn would have to sue the contractor. By recognizing a right in the landowner against the contractor, one suit may take the place of two, and the contractor's promise will be directly enforced and the lessee saved harmless as contemplated.

Another third party beneficiary problem was dealt with in the case of *Gateway Barge Line, Inc. v. Tyler Co.*[12] Plaintiffs, who had rented certain equipment to a subcontractor on a highway project, sought to recover unpaid rentals from the surety on the subcontractor's bond. There is general agreement that words of condition in such a bond should be construed as words of promise. Although the opinion does not disclose the exact wording, the bond which named the principal contractor as obligee appears to have been conditioned only on the performance of

10. LA. CIVIL CODE art. 1890.
11. 183 So. 2d 62 (La. App. 3d Cir. 1966).
12. 175 So. 2d 867 (La. App. 1st Cir. 1965). See also Carrand Marine, Inc. v. R. V. Tyler Co., 175 So. 2d 871 (La. App. 1st Cir. 1965).

the contract by the subcontractor. However, the mentioned contract obligated the subcontractor to furnish a bond guaranteeing specifically the payment of materials, labor, and the rental of equipment. That is, the condition of the bond called indirectly for the payment to plaintiff of amounts due for rentals. It was held that the plaintiff equipment lessors did not have a cause of action against the surety as third party beneficiaries of the bond. The cases cited in the court's opinion may be counted as authority for the decision, yet other decisions continue to leave the legal area in question involved in doubt.[13] Although a contract of suretyship is to be strictly construed, authority is not lacking for the view that facts like the present should be held legally sufficient to support recovery by the third parties identified directly or indirectly by the condition.[14]

In the case of *Roberts v. Hayes*,[15] the Supreme Court extended the jurisprudence dealing with oral agreements of joint venture or partnership by holding that parol evidence is not admissible to prove ownership of the stock of a corporation in the name of which a mineral lease interest was acquired by a partnership or joint venture formed orally for the purpose of securing mineral leases. The claim by plaintiff was that his copartner had acquired a certain mineral lease through a corporation formed by the latter for the purpose, and that, in consequence, the stock of the corporation belonged to the partnership. The position of the court, in substance, was that, although ownership of corporate stock is subject to proof by parol, since direct ownership of a mineral interest by a partnership or joint venture formed orally cannot be established, neither can ownership of such an interest be established indirectly through proof of the ownership of corporate stock.

In *Long v. Matthews*,[16] the court rejected parol evidence to support a claim of compensation between a debt due a deceased person and amounts previously advanced to him. It relied on La. R.S. 13:3721, which precludes the use of parol evidence to

13. See Lichtentag v. Feitel, 113 La. 931, 37 So. 880 (1905); Bickham v. Womack, 181 La. 837, 160 So. 431 (1935).

14. 4 CORBIN, CONTRACTS, §§ 800, 801 (1950); Smith, *Third Party Beneficiaries in Louisiana: The Stipulation Pour Autrui*, 11 TUL. L. REV. 18 (1936). The case of Campti Motor Co. v. Jolley, 10 La. App. 287, 120 So. 684 (1929), which the court relied on as a "typical decision" in this area of the law, is therein criticized adversely.

15. 248 La. 682, 181 So. 2d 390 (1965).

16. 186 So. 2d 868 (La. App. 2d Cir. 1966).

prove a debt of the deceased if no suit was brought against him prior to his death "unless suit to enforce the debt or liability" is instituted against the succession within one year of its opening. At the same time the court approved the use of parol to prove the payment of a debt owing to the deceased. The ruling of the court on the first issue is not free of doubt. Legal compensation takes place by operation of law when two debts, equally liquidated and demandable, exist simultaneously. According to the redactors of the Code Napoleon, the effects of compensation derive from two propositions, viz., that compensation is (1) a double payment, and (2) a forced payment.[17] From this point of view, proof that compensation took place is simply proof of payment.[18] It is not at all clear why a person should be permitted to prove by parol that he paid a debt to a decedent and yet not be able to prove in such fashion that compensation had taken place. Furthermore, it appears probable that the purpose of the statutory provision was to prevent proof of a debt or liability of the deceased in order to collect on it. It deals with "a suit to enforce the debt or liability." A claim of compensation offered by way of defense bears no relationship to such a suit. Indeed, a person might not likely contemplate suit to enforce a debt that he considered had been discharged by compensation.

PARTICULAR CONTRACTS

SALE

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The problem of differentiating between what constitutes a breach of contract and a breach of the implied warranty against redhibitory vices or defects has not been adequately resolved by the jurisprudence. It is an important one because the period of prescription for breach of contract is ten years, whereas the redhibitory action is subject to a basic period of one year. Also, damages for a breach of contract are measured by losses sus-

17. 2 HENRI, LÉON AND JEAN MAZEAUD, LEÇONS DE DROIT CIVIL no 1154 (1962); 2 PLANIOL, CIVIL LAW TREATISE (A TRANSLATION BY THE LOUISIANA STATE LAW INSTITUTE), no. 588 (1960).

18. See LA. CODE OF CIVIL PROCEDURE art. 1005 (1960), which treats compensation as a method of extinguishment and consequently an affirmative defense.

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